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No. 90-1471

In The

Supreme Court of the United States

October Term, 1990

THE UPJOHN COMPANY,

Petitioner,

v.

NORTH HAVEN PLANNING AND ZONING COMMISSION and SCOTT SCHATZLEIN,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the decision or record below raises the question presented in the petition.

II. Whether an "approval" under regulations promulgated pursuant to the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901 *et seq.*, of a closure plan chosen by petitioner preempts the respondents' zoning regulations which do not permit landfills or waste piles on the lot where petitioner's chemical manufacturing plant is located.

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STATUTORY PROVISIONS INVOLVED

In addition to statutory provisions set out by the petitioner, other pertinent statutory and regulatory provisions are set out in the appendix to this brief. Res. App. 1.

STATEMENT OF THE CASE

This case involves a multimillion dollar corporation's creation of an illegal landfill on its property and its *post facto* efforts to circumvent local zoning regulations. Although local zoning regulations prohibit private landfills at the location owned by Upjohn, the petitioner Upjohn, without seeking any zoning authorization, created a 4.25 acre landfill of waste materials on the same lot where it operates a manufacturing plant. Even as Upjohn was promising the local planning and zoning commission that it would remove these materials, it was also, without informing the Commission, seeking environmental permits, required because the landfill contained hazardous wastes, to allow the permanent "capping" of the landfill on the site. Upjohn chose this capping method despite the fact that it knew or should have known that this plan violated local zoning regulations, and despite the existence of other environmentally sound closure methods.

Although the petitioner's self-selected plan complied with environmental standards for the closure of landfills containing hazardous wastes (a fact never disputed by respondents at any point in these proceedings), the landfill itself had from its beginning violated Town zoning regulations governing the *opening* and siting of landfills. The courts below found that the federal Environmental Protection Agency's (EPA) approval of petitioner's closure plan meant only that the plan satisfied environmental regulations (not that the plan was the *most* environmentally protective) and that the approval did not preempt the application of local zoning regulations. The EPA itself disavowed any claim of preemption when it stated, before approving Upjohn's plan, that Upjohn

would have to submit *another* closure plan requiring removal if local zoning authorities were successful in state court litigation concerning the removal of the landfill from this site. Against this background, the Second Circuit, in a *per curiam* opinion, properly rejected Upjohn's preemption argument. No further review is merited here.

A. Federal Legal Framework

The Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901 *et seq.*, is often described as a comprehensive "cradle to grave" program to ensure proper handling of hazardous waste. RCRA, however, operates by establishing substantive standards on each *phase* of hazardous waste activities: generation, storage, treatment, transportation and disposal. It does not, except in a rudimentary fashion, regulate the *siting* of hazardous waste facilities, a task that has been left to the states.[1]

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[1] See, e.g., 42 U.S.C. § 6924(b) (regulating location of hazardous waste in salt dome formations, salt bed formations, underground mines and caves). The EPA has promulgated three location standards pursuant to RCRA; *see* 40 C.F.R. § 264.18; including one concerning 100 year flood planes. 40 C.F.R. § 264.18(b). The landfill at issue is located adjacent to a tidal waterway and is surrounded by the 100 year flood plane area, but apparently satisfies the EPA regulations on this issue.

Petitioner's observation that Congress has utilized CERCLA funding to encourage states to provide hazardous waste sites only confirms that Congress intended siting decisions to be made by the states. Indeed, Connecticut has adopted provisions to regulate the siting of hazardous waste disposal facilities within the state. Conn. Gen. Stat. § 22a-114 *et seq.* (1991). Under Connecticut law, a hazardous waste facility

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While not regulating the location of hazardous waste facilities, RCRA expresses a definite preference for the types of disposal facilities that are most likely to protect the environment and human health and safety. In 1984, Congress, recognizing that landfills, surface impoundments, and other land disposal methods pose significant risks to human health and the environment, amended RCRA to prohibit the land disposal of specified hazardous wastes; see 42 U.S.C. §§ 6924(d) and (e); and also to encourage environmentally sound alternatives to land disposal. 42 U.S.C. § 6902(a)(6).

Under its RCRA authority, the EPA requires that those disposing of hazardous waste must submit a

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may be constructed or modified only if a certificate has been obtained from the Connecticut siting council. The council has "exclusive jurisdiction over the siting of the facilities," and is authorized to "give such consideration to other state laws and municipal ordinances and regulations as it shall deem appropriate." Conn. Gen. Stat. § 22a-124(a). While a municipality may apply its zoning regulations to a proposed facility, its decisions are appealable to the siting council which has authority to overturn local zoning rulings. Conn. Gen. Stat. § 22a-124(b).

The record below does not demonstrate that Upjohn has ever applied for a siting permit under these provisions of the Connecticut General Statutes, perhaps in reliance on a statutory exemption for industries that treat or recover hazardous waste on site as an integral part of an industrial process. Conn. Gen. Stat. § 22a-117(b). Such reliance would be misplaced since Upjohn seeks to dispose of hazardous waste in its illegal landfill rather than treat or recover the waste. Further, the exemption would be inapplicable given Upjohn's stated intention to close its North Haven operations while leaving its landfill permanently at the site. In any event, it is clear that Upjohn in this case seeks to avoid both state and local regulation of the siting of its landfill.

"closure" plan to address the final treatment and disposal of hazardous waste. 40 C.F.R. §§ 265.112(a) and (d), 265.140-.150. The method of closure is not prescribed by the regulations. See 40 C.F.R. § 265.113(a) (closure plan may involve treatment, removal, or onsite disposal of waste). The owner or operator has responsibility for designing the particular plan, 40 C.F.R. § 265.112, which is reviewed by the regional administrator to ensure compliance with certain environmental standards. 40 C.F.R. § 265.112(d)(4). The EPA regulations governing closure plans are not regulations governing the *siting* of hazardous waste facilities; indeed, the "closure" of a land disposal facility logically presumes that the facility has received permission to exist at the location in the first place.

Under EPA regulations, land disposal units include, among other types, "waste piles" and "landfills". See 40 C.F.R. §§ 260.10, 264.250 (waste piles) and 40 C.F.R. § 260.10 (landfill). Although Upjohn's sludge pile could conceivably have been characterized as either a "landfill" or a "waste pile"; see 40 C.F.R. § 260.10 (definition of "landfill" and "pile"); Upjohn chose to classify it as a "landfill," presumably because the closure plan selected by Upjohn would not have been permitted under the regulations governing the closure of "waste piles."[2]

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[2] EPA closure regulations require removal or decontamination of waste piles. 40 C.F.R. § 264.258(a).

B. Factual Background

Since 1962 the Upjohn Company has operated a chemical manufacturing plant in North Haven, Connecticut. Pet. App. 5a. The plant is located adjacent to a tidal waterway (the Quinnipiac River) and has immediate access to a major interstate highway (I-91). *Id.*

In 1979, the North Haven Planning and Zoning Commission (Commission) became aware that Upjohn had been stockpiling "sludge," a by-product of its waste treatment process, on its site. Pet. App. 5a; Joint Appendix in Court of Appeals ("JA") 458. Because the North Haven Zoning Regulations do not allow the permanent storage of waste materials at this location, the Commission began discussions with Upjohn regarding the removal of the sludge.[3] Pet. App. 7a-8a; JA 458; Record before Court of

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[3] The application of the North Haven zoning regulations to Upjohn's landfill has been the subject of state court lawsuits, which have upheld the Commission's determination that the landfill at this site violates the zoning regulations. The reasons for this determination have been set forth most recently in *Upjohn Company v. Planning and Zoning Comm'n of North Haven*, No. CV 90-305776 S (Conn Super. Ct., Jud. Dist. of New Haven March 25, 1991), where the court explained:

> Pursuant to Section 6 of the North Haven zoning regulations, the Commission determined that Upjohn's site was, at the time of the applications, in an industrial district. The permitted uses for such a district are restricted to those indicated by check marks in a table of permitted uses for the various zones. Pursuant to Section 6 "[n]o use shall be permitted in any Commercial or Industrial District except one which is indicated by a check mark

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Appeals ("Record"), Plaintiffs' Ex. 24, 25. At a meeting with the Commission in 1979, Upjohn responded to these concerns by representing that it was attempting to reduce the amount of sludge generated and was also investigating a technology that would allow the sludge to be thickened and removed off site. JA 457-58. The Commission

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> . . . applicable to the district in which such use is located." The permitted uses set forth in §§ 6.1.1.-6.1.74, for the district in which Upjohn's property is located do not include a landfill or storage of sludge or chemical waste.
>
> The evidence on the record supports the determination that the maintenance of a four-acre sludge pile does not constitute an accessory use pursuant to § 6.1.71 of the regulations, which permits "accessory uses customarily incidental to a permitted use on the same premises." If the permanent storage of waste produced by a permitted use were construed to be an accessory use, each and every household and business that produced trash or debris would be entitled to maintain a permanent landfill on its premises. Since several of the explicitly permitted uses enumerated in Section 6 of the zoning regulations concern storage of various substances, long term storage of waste in bulk cannot logically be viewed as a generally authorized accessory use. (See §§ 6.1.55, 6.1.65, 6.1.66, 6.1.67, 6.1.72).

Resp. App. 25-26. *See also Upjohn Co. v. North Haven Zoning Board of Appeals*, No. CV-86-0250632-S at 15-17 (Conn. Super. Ct., Jud. Dist. of New Haven February 21, 1991) (construing North Haven zoning regulations to the same effect).

It should be noted that the pertinent North Haven zoning regulations predate the landfill and that Upjohn, a multimillion dollar corporation, had actual or constructive knowledge of these provisions at the time it began the creation of this landfill.

had further interactions with Upjohn regarding the sludge over the next few years, JA 459-466, 472, and in 1983, the Commission required Upjohn, as a condition to approving permits relating to its waste treatment process, to submit a timetable for removing the sludge pile on the site. Pet. App. 8a. After no action was taken by Upjohn to comply with this requirement, the Commission in 1985 again requested Upjohn to submit a plan for sludge removal. JA 563. Upjohn responded that it was still investigating possible uses for the sludge, but that it would dispose of the 4.25 acre 40 foot pile of sludge at the rate of 1 truckload a week. Pet. App. 8a; JA 563. At a later meeting with the Commission, an Upjohn representative indicated that Upjohn was committed to removing the sludge from the site, and that sludge could be removed at a rate of 3 to 4 truckloads a week. JA 485, 569. In the meantime, Upjohn continued to add sludge to its landfill. It stopped only in 1985 after the pile collapsed because Upjohn had added a substantial amount of material that had insufficient time to dry. Pet. App. 6a. The collapse caused damage to water treatment devices on the property. *Id.* Since the collapse, the additional sludge produced by Upjohn has been trucked off site. JA 96-97.

While Upjohn was representing to the Commission in 1985 that it was committed to the removal of the sludge pile, it was simultaneously beginning the process of seeking approvals from state and federal environmental authorities to "cap" the pile and leave it permanently on the site. JA 334; Pet. App. 9a. Although Upjohn's plans to "cap" the site contradicted what it had represented and was representing to the Commission, it never informed the Commission of its communications with state and

federal environmental authorities. The Commission only learned of these developments from an outside source. JA 407. Thereafter the Commission, which had restrained from taking further formal actions against Upjohn on the belief that Upjohn was acting in good faith, issued a cease and desist order in 1986 requiring removal of the pile. Pet. App. 8a. Upjohn appealed this order first to the North Haven Zoning Board of Appeals and then to the Connecticut Superior Court, which recently dismissed the appeal and upheld the cease and desist order. *Upjohn Company v. North Haven Zoning Board of Appeals*, No. CV 86-0250632 S (Conn. Super. Ct., Jud. Dist. of New Haven February 21, 1991).[4] Upjohn has sought further review of that decision in the Connecticut Appellate Court.

On September 29, 1989, the Connecticut Department of Environmental Protection (DEP) and EPA issued an "approval" of Upjohn's closure plan, JA 655-56, which Upjohn immediately and unilaterally began to implement. JA 6-7, 14. In January 1990, Upjohn announced its decision to close its North Haven manufacturing facility, Pet. App. 10a, intending to leave behind permanently its 4.25 acre, 40 foot high landfill.

C. Proceedings Below

1. District Court Proceedings

After Upjohn received its approval from the DEP and EPA, it announced that it would immediately begin work to cap the site pursuant to its closure plan. JA 6-7, 14.

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[4] Upjohn has represented that it has lodged ten copies of this decision with the Clerk of the Court. Pet. Brief, p. 8 n.5.

Although the capping plan involved excavation and fill activities for which zoning permits and site plan approval were needed, Upjohn failed to apply for such permits and approval. Pet. App. 10a. Shortly thereafter, the Commission and its Zoning Enforcement Officer filed this action in Connecticut Superior Court seeking to enjoin Upjohn from implementing the closure plan, and seeking also to compel Upjohn to bring its property into conformity with the zoning regulations. Pet. App. 4a. Upjohn removed this action to the United States District Court for the District of Connecticut and filed a counterclaim in which it sought to enjoin the Commission and its Zoning Enforcement Officer from enforcing any order or regulations that would require Upjohn to remove the sludge pile from the premises or would prevent Upjohn from implementing the closure plan. Pet. App. 4a-5a. After a four day trial, the district court held that the DEP/EPA approval of the capping plan did not preempt the application and enforcement of the North Haven Zoning Regulations or enforcement orders by the Zoning Enforcement Officer.[5] Pet. App. 21a. Upjohn had claimed that the

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[5] The district court abstained from deciding whether the landfill itself violated the zoning regulation. Pet. App. 12a. The parties had litigated this issue before the court, with Upjohn claiming that the landfill was an accessory use to its manufacturing plant, and the Commission claiming that the permanent storage of 4.25 acres of waste could not be considered an accessory use. Pet. App. 10a. The district court's abstention was based in part on pending state law questions on this issue, and the decision to abstain has not been challenged by Upjohn in its petition for writ of certiorari. State courts have subsequently decided the zoning issue, finding that the landfill violates the zoning regulations. *See supra* note 3.

DEP/EPA approval preempted the application of local zoning regulations because it was impossible to comply with both the regulations, requiring removal, and the "approval", requiring capping on the site. The district court rejected this argument, finding that the "approval" simply meant that the plan satisfied regulations, and did not constitute either an order to cap the pile or a preference of this plan over other closure options. The court stated:

> Upjohn's argument that the Approval constitutes an EPA determination that Upjohn's plan represents the most sound environmental action, and therefore any obstacle to its implementation is an obstacle to congressional goals is also not persuasive. There are many methods in which a hazardous waste site might be closed in accordance with RCRA, including removal. See 40 C.F.R. § 265.113(a). The language of the Approval contains no indication that the EPA or DEP has determined that this method of closure is the most environmentally protective. See Def's exh. 524. Furthermore, the conclusion that the EPA and DEP simply determined that federal and state standards were satisfied by the plan is supported by the fact that these agencies issued an Approval, rather than an order. Indeed, in a different context the defendant points out that the EPA had the power to issue an order requiring Upjohn to remove the material. . . . The Court also notes that the language of the Approval itself includes that it does not relieve Upjohn from obtaining any further authorizations required by the Connecticut General Statutes, which provide for the enactment of local zoning regulations. CONN. GEN. STAT. §§ 8-1,8-2.

Pet. App. 20a-21a. The court also relied on the fact that the RCRA savings clause, 42 U.S.C. § 6929, clearly provided a role for local government, thereby further exhibiting a congressional purpose not to exclude local regulation. Pet. App. 21a.

2. The Court of Appeals Decision

In a *per curiam* opinion, the Second Circuit affirmed the judgment of the district court. The court made note of the savings clause, whereby Congress explicitly stated that state and local governments were authorized to adopt regulations, including regulations for site selection, that are more stringent than EPA regulations adopted under RCRA. Pet. App. 2a. Like the district court, the Second Circuit observed that the "approval" by its very terms did *not* relieve Upjohn from its obligation to obtain other authorizations required by provisions of the Connecticut General Statutes. As the court noted, the Connecticut General Statutes delegate zoning authority to local municipalities. *Id.* The court also referred to the EPA's own position, as reflected in its response to public comments on the closure plan, that, if in a pending lawsuit the Town were successful in upholding the order to remove the landfill from this site, Upjohn would have to submit an alternate closure plan for review and approval. *Id.*, at 2a-3a. Based on the EPA's own position as well as these other matters, the Second Circuit found that federal law and regulatory actions do not preempt the Town's zoning regulations. *Id.*, at 3a.

REASONS FOR DENYING THE PETITION

I. NEITHER THE DECISION BELOW NOR THE RECORD RAISES THE QUESTION PRESENTED IN THE PETITION

The sole question presented by the petitioner is whether, consistent with RCRA:

> a local government may ban disposal of locally generated hazardous waste within its borders, even though the federal Environmental Protection Agency has approved a local disposal plan as safe and the local government has not established that the plan is unsafe.

Brief for Petitioner at (i). The Second Circuit, however, was never asked to address the question of a local "ban" of the disposal of hazardous waste. Moreover, the record below does not support a determination of that question by this Court. The petitioner, in short, has recast both law and facts to pose a question that was not presented to either the district court or the Second Circuit.

In the proceedings below, the two principal issues were (1) whether Upjohn's sludge pile was allowed, under the North Haven Zoning Regulations, at this site, and (2) if not, whether the application of those zoning regulations was preempted by the EPA/DEP "approval". See Pet. App. 10a (discussing claims raised by parties in district court). Upjohn simply never raised, and the courts below never considered, whether North Haven had imposed a town-wide ban of hazardous waste disposal facilities or whether such a ban would be

permissible.[6] The issue of a town-wide ban of hazardous waste – as opposed to a prohibition of a landfill at this location – was never raised below, presumably because Upjohn never intended to have the landfill located anywhere other than where it had (illegally) put it. Had the ban issue been raised, the Town could have addressed it factually and legally.[7]

The relevant zoning regulations at issue concern not a town-wide "ban" of hazardous waste disposal, but a prohibition of the on-site permanent disposal of waste.

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[6] *See* Upjohn's Proposed Findings of Fact and Conclusions of Law, dated January 31, 1990, filed with the district court after the close of evidence (town-wide "ban" issue never discussed). It is apparent that Upjohn has simply adopted a new case theory for the first time in its petition for certification. At trial Upjohn argued that the Commission's regulations were preempted because, it claimed, the "approval" was tantamount to an order, and Upjohn could not both cap the pile, as required by the order, and remove the pile from the site, as required by the Commission. The courts below rejected this claim, finding that the approval was not an order, and was not intended to preempt local zoning regulations. Upjohn now appears to have abandoned this theory in favor of the "town-wide ban" theory – a theory that was never developed factually or legally in the courts below and that has never been disclosed to the Commission before the filing of this petition.

[7] Drawing an inference from perceived silence by the Town, Upjohn asserts "There can be little doubt that the ban in this case is, in fact, a ban." Petition, 21 at n.22. This statement, and the corresponding lack of evidence, only highlights how this issue has not been addressed below. Indeed, although the parties did not argue or brief the issue at the district court, that court nevertheless found in passing that the Town has *not* banned disposal activity within the Town. Pet. App. 20a.

See supra note 3 (discussing zoning basis for denial of landfill at this site).[8] At no point in these proceedings has Upjohn challenged the validity of this restriction. Nor could it reasonably do so: not only does the on-site disposal of waste create nuisance problems, it also detracts from the value of the land and restricts both present and future uses of the site.[9] Here, Upjohn has taken a parcel abutting a significant tidal waterway with immediate access to a major interstate highway and, in blatant violation of the Town's zoning regulations, converted a portion of this lot into a landfill. Upjohn has fabricated a new issue of a "town-wide ban" that has nothing to do with the particular regulations that require removal of the sludge pile from the site.

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[8] The regulations at issue do not distinguish *hazardous* waste from other types of waste. *See supra* note 3. *See also*, Dist. Court Opinion, Pet. App. 18a ("The North Haven zoning regulations at issue, . . . do not specifically address *hazardous* waste storage or disposal"). Indeed, this whole case amounts to a claim for special treatment by Upjohn simply *because* its illegal landfill contains hazardous waste.

[9] Upjohn states that "[t]he Town has never suggested that Upjohn's pile poses problems unique to its site . . . ," ignoring the fact that the issue litigated in the district court was whether, under the North Haven zoning regulations, the landfill constituted an accessory use to Upjohn's chemical plant, and not whether, as a matter of zoning policy, Upjohn's landfill should be allowed at this site. Even so, the testimony of the former North Haven Zoning Enforcement Officer on the issue of accessory use suggests some of the wider zoning concerns involved when on-site waste storage is permanently allowed on lots in conjunction with other uses:

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Accordingly, because the record below lacks the factual and legal basis necessary to review the question posed by Upjohn, the petition should be denied.

II. THE NORTH HAVEN ZONING REGULATIONS PROHIBITING THE UPJOHN LANDFILL ARE NOT PREEMPTED BY THE APPROVAL BY THE EPA OF THE CLOSURE PLAN CHOSEN BY UPJOHN.

The issue of a "town-wide ban" promulgated by the North Haven zoning regulations was not raised below,

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> Well, as a zoning enforcement officer and someone who has studied planning and zoning an accessory use is one which is dependent, which is minor, which is subordinate to the main use, would be an accessory. It is not a primary use of the site. The storage of waste on the site, the permanent storage of waste is not considered an accessory use. Perhaps the manufacture of waste could be considered an accessory use, but not the outside storage and disposal of waste on site. There is no other site in the Town of North Haven that does this. They all remove their waste, no matter what type of waste it is, to other sites.
>
> And what concerns me as a zoning person is that the sludge pile will become the primary use of this site if Upjohn moves, and what they are contemplating as an accessory use will become a primary use, and the entire use of that property and the value of the land is gone. And the purpose of Planning and Zoning is to always consider the highest and best use of the property, and to have a four acre sludge pile which has been a violation on this site cannot be construed as an accessory use.

JA 53-54.

and therefore the sole question presented by Upjohn in its petition is not appropriate for review by this Court. What the courts below did decide is that neither RCRA nor the EPA approval preempted the pertinent provisions of the North Haven zoning regulations. This conclusion is correct.

Under the Supremacy Clause, federal law may preempt state and municipal law in several different ways. *See generally Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 712-13 (1985). First, Congress may preempt state or local law by so stating in express terms. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). Second, in the absence of express preemptive language, preemption will be applied where federal legislation is so comprehensive in a given area as to leave no room for supplemental state or local legislation. *International Paper, Co. v. Ouellette*, 479 U.S. 481, 491 (1987). Finally, even if Congress has not displaced state or local action in an area, state or local law is displaced to the extent that it actually conflicts with federal law or with congressional purposes and goals. *Hillsborough Co. v. Automated Medical Laboratories, Inc., supra*. Such a conflict occurs when compliance with both federal and state regulations is a physical impossibility, or when state law stands as an obstacle to the accomplishment and execution of the full purposes of Congress. *Id.*

Upjohn makes no claim that the zoning regulations and the Commission's orders are preempted under either of the first two methods, i.e., express preemption or total occupation of the subject matter. Nor could it reasonably make such a claim. Congress explicitly acknowledged in RCRA that "the collection and disposal of solid waste

should continue to be primarily the function of state, regional and local agencies." 42 U.S.C. § 6901(a)(4). In addition, in 42 U.S.C. § 6929, Congress explicitly provided that "nothing in this chapter shall be construed to prohibit any State or political subdivision thereof from imposing any requirements, including those for site selection, which are more stringent than those imposed by such regulations." In addition, this Court has explicitly rejected the claim that RCRA was intended to preempt the entire field of interstate waste management. *City of Philadelphia v. New Jersey*, 437 U.S. 617, 620 n.4 (1978).

Rather, Upjohn claimed below that the Commission's regulations and its actions are preempted under the third method of preemption, i.e., because the zoning regulations and the Commission's order stand as an obstacle to the full purposes and objectives of Congress, as set forth in RCRA. This claim is wholly without merit.

First, nothing in either RCRA or the pertinent EPA closure regulations suggests any intent to preempt state or local land use decisions regarding the siting of landfills containing hazardous waste.[10] As stated above, RCRA itself contains only minimal siting criteria, and the RCRA savings clause explicitly singles out "site selection" requirements as subjects to be regulated by state or

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[10] Here, of course, the pertinent regulations concern the permanent on-site storage of waste, and do not distinguish hazardous wastes from other kinds of wastes. *See, supra* notes 3 and 8.

local governments.[11] Likewise, the pertinent EPA regulations governing closure of landfills govern just that: the *closure*, not the opening or siting of landfills. Furthermore, the EPA regulations require only that closure plans satisfy *environmental* concerns, and do not address land use concerns. 40 C.F.R. § 265.112(d)(4). Compare Conn. Gen. Stat. § 22a-122(b) (1991) (Connecticut Siting Council specifically authorized to consider environmental factors as well as "local and regional land use plans and regulations" when reviewing applications for the siting of a hazardous waste disposal facility). Thus, where neither RCRA nor EPA closure regulations exhibit any intent to regulate siting or land use decisions, and where a state procedure exists to provide safeguards against unjustified local opposition to proposed hazardous waste sites, local land use regulation of hazardous waste sites cannot be deemed to be an obstacle to the purposes and objectives of Congress.

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[11] Petitioner has referred to the 1986 amendment to CERCLA, contained at 42 U.S.C. § 9604(c)(9), in which Congress declared that no superfund money may be spent for remedial actions in states that fail to make arrangements to provide disposal capacity for the hazardous wastes generated in that state. It is questionable what effect this 1986 amendment has on the landfill at issue, which stopped receiving waste in 1985. In any event, this provision, to the extent it has any relevance here, evinces a congressional intent to compel *states* to create an equitable hazardous waste siting procedure. As stated above, Connecticut has adopted legislation creating a statewide siting council with exclusive jurisdiction over siting decisions. The council may overrule local zoning decisions, thereby providing protection from the NIMBY concerns repeatedly referred to by Upjohn. *See supra* note 1. There is no evidence in the record that Upjohn has attempted to utilize this procedure.

Second, as the courts below recognized, the DEP/EPA approval was *not* a determination that the capping method chosen by Upjohn was the *most* environmentally sensitive disposal method under RCRA. See Pet. App. 20a-21a. There is nothing in either RCRA or the DEP/EPA approval that indicates that the action mandated by the Commission (removal from this site) is inconsistent with environmentally safe closure methods. *Id.* Indeed, EPA regulations explicitly allow closure to be accomplished by removal. 40 C.F.R. § 265.113(a).

Furthermore, as noted by the Second Circuit, the EPA itself suggested that Upjohn's closure plan was simply one among many closure options, when it responded to public comments as follows:

> **Public Comment**
>
> Will DEP/EPA require Upjohn to submit, along with its pending application for the closure/post-closure plan, a plan indicating how they would remove the sludge pile in the event the pending North Haven Planning and Zoning court action[12] so required?

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[12] The action referred to in this comment is *Upjohn Co. v. North Haven Zoning Board of Appeals*, No. CV 86-0250632 (Conn. Super. Ct., Jud. Dist. of New Haven February 21, 1991), which was the only action between the parties at the time this comment was made. That case concerned the validity of the 1986 cease and desist order requiring Upjohn to remove the landfill from its property. This order was issued by the North Haven Zoning Enforcement Officer, who acts as the agent of the Planning and Zoning Commission; this order was appealed by

(Continued on following page)

DEP/EPA Response

No. If the final determination from the court upholds the complaint filed by the Planning and Zoning Commission, Upjohn would have to submit *a waste removal closure/post-closure plan* to DEP/EPA for review and approval.

(Emphasis added). JA 603. This response clearly indicates the EPA itself did not intend an approval of this plan to displace any additional requirements imposed by the Commission, provided those requirements were upheld in court.

The language and legislative history of RCRA also support the lower court's conclusion that the DEP/EPA approval of the plan was simply an approval of one method rather than a choice of the most environmentally sensitive method. Upjohn's capping plan is a "land disposal" method of disposing of hazardous waste. Record, Defendant's Ex. 505 (identifying capping plan as complying with EPA land disposal regulations). In the recent amendments to the RCRA, however, Congress has focused on the need to develop environmentally sound *alternatives* to land disposal. 42 U.S.C. § 6901(b)(7) & (8). *See ENSCO, Inc. v. Dumas*, 807 F.2d 743, 744 (8th Cir. 1986) ("Act specifies that its objective will be advanced through encouragement of treatment *in preference to* land disposal

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Upjohn to the North Haven Zoning Board of Appeals, and thereafter to the Connecticut Superior Court. Upjohn's flippant reference to the lawsuit referred to in the comment as a "non-existent lawsuit" is a sorry effort to import confusion to the obvious meaning of the EPA comment.

of hazardous waste . . . ") (emphasis added). One of the express objectives of RCRA, as amended in 1984, is the "minimizing [of] . . . land disposal of hazardous waste by encouraging process substitution, materials recovery, properly conducted recycling and reuse, and treatment." 42 U.S.C. § 6902(a)(6). In addition, in the 1984 amendments, Congress found that "to avoid substantial risk to human health and the environment, reliance on land disposal should be minimized or eliminated, and land disposal, particularly landfill and surface impoundment should be the least favored method for managing hazardous wastes." 42 U.S.C. § 6901(b)(7). As the conference report on the 1984 legislation explained:

> [T]he Conferees intend that through the vigorous implementation of the objectives of this Act, land disposal will be eliminated for many wastes and minimized for others, and that *advanced treatment*, recycling, *incineration* and other hazardous waste control technologies should replace land disposal.

HR Conf. Rep. No. 98-1133, 98th Cong. 2d Sess. at 80-81, *reprinted in* 1984 U.S. Code Cong. and Ad. News at 5651, quoted in *Ogden Environmental Services v. City of San Diego*, 687 F. Supp. 1436, 1442-43 (S.D. Cal. 1988) (emphasis added).[13] Here, before submitting its closure

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[13] The EPA, like Congress, has recognized the dangers posed by landfill methods of hazardous waste disposal, and has, in fact, candidly acknowledged that all landfills will leak:

> There is good theoretical and empirical evidence that the hazardous constituents which are in place in land disposal facilities very likely will migrate from

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plan, Upjohn considered and priced options, including chemical fixation and incineration, that would minimize the volume of sludge necessary for land disposal. JA 34-35; Record, Ex. 21A, 505. Despite RCRA's preference for methods other than land disposal, however, Upjohn proposed a closure plan consisting of 100% on-site land disposal – undoubtedly because of the lower costs of this plan. Accordingly, neither the language nor legislative history of RCRA supports Upjohn's claim that its land disposal capping method is the most environmentally sensitive disposal method under RCRA for disposing of the sludge pile.

Furthermore, both the DEP and EPA have authority to order Upjohn to adopt a particular course of action; indeed, these agencies issued such an order on Upjohn on the same day they issued their approval of Upjohn's closure plan. JA 53, 602. Record, Plaintiffs' Ex. 6. The fact that these agencies did not *order* Upjohn to adopt its closure plan, and stated that they would merely require Upjohn to submit another plan if required by court action to remove the sludge, indicates that the EPA and DEP did not consider the removal order advocated by the plaintiffs to be a threat to the congressional goals and policies of RCRA. *See Hillsborough County v. Automated Medical*

(Continued from previous page)

> the facility into the broader environment. This may occur several years, even many decades, after placement of the waste in the facility, but data and scientific prediction indicate that, in most cases, even with the application of best available land disposal technology, it will occur eventually.

46 Fed. Reg. 11128 (1981).

Laboratories. Inc., 471 U.S. at 721 (fact that FDA has authority to preempt local ordinance and has not done so indicates that local ordinance is not a threat to federal goals).

Moreover, as RCRA recognizes, the regulation of waste disposal is a traditional state concern. 42 U.S.C. § 6901(a)(4). "Where . . . the field that Congress is said to have preempted has been traditionally occupied by the States 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress'." *Hillsborough County v. Automated Medical Laboratories. Inc.*, 471 U.S. at 715. To prevail here, Upjohn must demonstrate "a conflict between a particular local provision in the Federal scheme, that is strong enough to overcome the presumption that State and local regulation of health and safety matters can constitutionally co-exist with Federal regulation." *Id.* Where the action required by the Commission (removal) is a permitted waste disposal method under RCRA, it cannot be said that the Commission's regulations and orders requiring removal interfere with the Federal goal of the safe disposal of hazardous waste.

III. THE DECISION BELOW DOES NOT CONFLICT WITH DECISIONS OF OTHER FEDERAL COURTS.

The petitioner claims that the Second Circuit's decision affirming a "local ban" of hazardous wastes is in conflict with the decisions by other Federal Courts, particularly the Eight Circuit's decision in *ENSCO, Inc. v.*

Dumas, 807 F.2d 743 (8th Cir. 1986). *See also Ogden Environmental Services, Inc. v. City of San Diego*, 687 F. Supp. 1436 (S.D. Cal. 1988). As stated above, the Second Circuit did not address or decide the issue of a "local ban," and, accordingly these decisions simply have no applicability to the decision below.

ENSCO and *Ogden*, in any event, are radically different from the instant case. First, the federal policies at issue in *ENSCO* and *Ogden* cases are not at issue here. Both *ENSCO* and *Ogden* concern the siting of incineration facilities, which, as both courts emphasized, Congress has explicitly attempted to promote as an alternative to land disposal methods. *See supra* discussion at pp. 21-22. Here, in contrast, Upjohn's proposed capping plan involved a land disposal method, which is actually discouraged by RCRA. *ENSCO*, 807 F.2d at 744.

Second, the ordinances at issue in *ENSCO* and *Ogden* were essentially environmental ordinances regulating the same subject matter as RCRA and the EPA; the courts considered whether the local ordinances constituted efforts to second-guess health and safety issues already considered by the EPA. Here, in contrast, the focus of the North Haven zoning regulations is on *land use* rather than environmental matters. While "[t]he line between environmental regulation and land use planning will not always be bright . . . the core activity described by each phrase is undoubtedly different." *California Coastal Comm'n. v. Granite Rock Co.*, 480 U.S. 572, 587 (1987). "Land use planning in essence chooses particular uses for the land; environmental regulation, at its core, does not mandate particular uses of the land but requires only

that, however the land is used, damage to the environment is kept within prescribed limits." *Id.* Indeed, Upjohn's whole argument – that the Commission could not prohibit Upjohn's landfill absent a legitimate *environmental* justification – denies *any* independent role to land use (vs. environmental) concerns in the siting of landfills. This claim finds no support in any of the statutory authority or case law cited by Upjohn.

Finally, as the district court pointed out, the local ordinances in *ENSCO* and *Ogden* were enacted *after and in response to* EPA actions. *See ENSCO*, 807 F.2d at 744. Here, in contrast, the Commission found Upjohn to be in violation of the zoning regulations *before* Upjohn even applied for its closure plan, and the relevant regulations predated Upjohn's landfill by many years. Indeed, Upjohn submitted its closure plan to the EPA and DEP despite its knowledge that that proposed capping plan would be inconsistent with the Commission's removal order and despite the fact that EPA regulations provide for closure methods that *are* consistent with the zoning regulations. Thus, unlike *ENSCO* and *Ogden*, the regulations at issue were not enacted to challenge federal authority. JA 21.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully Submitted,

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APPENDIX A

STATUTES AND REGULATIONS

42 U.S.C. § 6924. Standards applicable to owners and operators of hazardous waste treatment, storage, and disposal facilities

* * *

(b) Salt dome formations, salt bed formations, underground mines and caves

(1) Effective on November 8, 1984, the placement of any noncontainerized or bulk liquid hazardous waste in any salt dome formation, salt bed formation, underground mine, or cave is prohibited until such time as –

(A) the Administrator has determined, after notice and opportunity for hearings on the record in the affected areas, that such placement is protective of human health and the environment;

(B) the Administrator has promulgated performance and permitting standards for such facilities under this subchapter, and;

(C) a permit has been issued under section 6925(c) of this title for the facility concerned.

(2) Effective on November 8, 1984, the placement of any hazardous waste other than a hazardous waste referred to in paragraph (1) in a salt dome formation, salt bed formation, underground mine, or cave is prohibited until such time as a permit has been issued under section 6925(c) of this title for the facility concerned.

(3) No determination made by the Administrator under subsection (d), (e), or (g) of this section regarding

any hazardous waste to which such subsection (d), (e), or (g) applies shall affect the prohibition contained in paragraph (1) or (2) of this subsection.

(4) Nothing in this subsection shall apply to the Department of Energy Waste Isolation Pilot Project in New Mexico.

* * *

(d) Prohibitions on land disposal of specified wastes

(1) Effective 32 months after November 8, 1984 (except as provided in subsection (f) of this section with respect to underground injection into deep injection wells), the land disposal of the hazardous wastes referred to in paragraph (2) is prohibited unless the Administrator determines the prohibition on one or more methods of land disposal of such waste is not required in order to protect human health and the environment for as long as the waste remains hazardous taking into account –

(A) the long-term uncertainties associated with land disposal,

(B) the goal of managing hazardous waste in an appropriate manner in the first instance, and

(C) the persistence, toxicity, mobility, and propensity to bioaccumulate of such hazardous wastes and their hazardous constituents.

For the purposes of this paragraph, a method of land disposal may not be determined to be protective of human health and the environment for a hazardous waste referred to in paragraph (2) (other than a hazardous

waste which has complied with the pretreatment regulations promulgated under subsection (m) of this section), unless, upon application by an interested person, it has been demonstrated to the Administrator, to a reasonable degree of certainty, that there will be no migration of hazardous constituents from the disposal unit or injection zone for as long as the wastes remain hazardous.

(2) Paragraph (1) applies to the following hazardous wastes listed or identified under section 6921 of this title:

(A) Liquid hazardous wastes, including free liquids associated with any solid or sludge, containing free cyanides at concentrations greater than or equal to 1,000 mg/l.

(B) Liquid hazardous wastes, including free liquids associated with any solid or sludge, containing the following metals (or elements) or compounds of these metals (or elements) at concentrations greater than or equal to those specified below:

(i) arsenic and/or compounds (as As) 500 mg/l;

(ii) cadmium and/or compounds (as Cd) 100 mg/l;

(iii) chromium (VI and/or compounds (as Cr VI)) 500 mg/l;

(iv) lead and/or compounds (as Pb) 500 mg/l;

(v) mercury and/or compounds (as Hg) 20 mg/l;

(vi) nickel and/or compounds (as Ni) 134 mg/l;

(vii) selenium and/or compounds (as Se) 100 mg/l; and

(viii) thallium and/or compounds (as Th) 130 mg/l.

(C) Liquid hazardous waste having a pH less than or equal to two (2.0).

(D) Liquid hazardous wastes containing polychlorinated biphenyls at concentrations greater than or equal to 50 ppm.

(E) Hazardous wastes containing halogenated organic compounds in total concentration greater than or equal to 1,000 mg/kg.

When necessary to protect human health and the environment, the Administrator shall substitute more stringent concentration levels than the levels specified in subparagraphs (A) through (E).

(3) During the period ending forty-eight months after November 8, 1984, this subsection shall not apply to any disposal of contaminated soil or debris resulting from a response action taken under section 9604 or 9606 of this title or a corrective action required under this subchapter.

(e) Solvents and dioxins

(1) Effective twenty-four months after November 8, 1984 (except as provided in subsection (f) of this section with respect to underground injection into deep injection wells), the land disposal of the hazardous wastes referred to in paragraph (2) is prohibited unless the Administrator determines the prohibition of one or more methods of land disposal of such waste is not required in order to protect human health and the environment for as long as the waste remains hazardous, taking into account the

factors referred to in subparagraph (A) through (C) of subsection (d)(1) of this section. For the purposes of this paragraph, a method of land disposal may not be determined to be protective of human health and the environment for a hazardous waste referred to in paragraph (2) (other than a hazardous waste which has complied with the pretreatment regulations promulgated under subsection (m) of this section), unless upon application by an interested person it has been demonstrated to the Administrator, to a reasonable degree of certainty, that there will be no migration of hazardous constituents from the disposal unit or injection zone for as long as the wastes remain hazardous.

(2) The hazardous wastes to which the prohibition under paragraph (1) applies are as follows –

> (A) dioxin-containing hazardous wastes numbered F020, F021, F022, and F023 (as referred to in the proposed rule published by the Administrator in the Federal Register for April 4, 1983), and
>
> (B) those hazardous wastes numbered F001, F002, F003, F004, and F005 in regulations promulgated by the Administrator under section 3001 (40 C.F.R. 261.31 (July 1, 1983)), as those regulations are in effect on July 1, 1983.

(3) During the period ending forty-eight months after November 8, 1984, this subsection shall not apply to any disposal of contaminated soil or debris resulting from a response action taken under section 9604 or 9606 of this title or a corrective action required under this subchapter.

40 C.F.R. § 260.10 Definitions.

When used in Parts 260 through 265 and 268 of this chapter, the following terms have the meanings given below:

* * *

Landfill means a disposal facility or part of a facility where hazardous waste is placed in or on land and which is not a pile, a land treatment facility, a surface impoundment, an underground injection well, a salt dome formation, a salt bed formation, an underground mine, or a cave.

* * *

Pile means any non-containerized accumulation of solid, nonflowing hazardous waste that is used for treatment or storage.

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40 C.F.R. § 264.18 Location standards.

(a) *Seismic considerations.* (1) Portions of new facilities where treatment, storage, or disposal of hazardous waste will be conducted must not be located within 61 meters (200 feet) of a fault which has had displacement in Holocene time.

(2) As used in paragraph (a)(1) of this section:

(i) "Fault" means a fracture along which rocks on one side have been displaced with respect to those on the other side.

(ii) "Displacement" means the relative movement of any two sides of a fault measured in any direction.

(iii) "Holocene" means the most recent epoch of the Quarternary period, extending from the end of the Pleistocene to the present.

(b) *Floodplains.* (1) A facility located in a 100-year floodplain must be designed, constructed, operated, and maintained to prevent washout or any hazardous waste by a 100-year flood, *unless* the owner or operator can demonstrate to the Regional Administrator's satisfaction that:

(i) Procedures are in effect which will cause the waste to be removed safely, before flood waters can reach the facility, to a location where the wastes will not be vulnerable to flood waters; or

(ii) For existing surface impoundments, waste piles, land treatment units, landfills, and miscellaneous units, no adverse effects on human health or the environment will result if washout occurs, considering:

(A) The volume and physical and chemical characteristics of the waste in the facility;

(B) The concentration of hazardous constituents that would potentially affect surface waters as a result of washout;

(C) The impact of such concentrations on the current or potential uses of and water quality standards established for the affected surface waters; and

(D) The impact of hazardous constituents on the sediments of affected surface waters or the soils of the 100-year floodplain that could result from washout.

(2) As used in paragraph (b)(1) of this section:

(i) "100-year floodplain" means any land area which is subject to a one percent or greater chance of flooding in any given year from any source.

(ii) "Washout" means the movement of hazardous waste from the active portion of the facility as a result of flooding.

(iii) "100-year flood" means a flood that has a one percent chance of being equalled or exceeded in any given year.

(c) *Salt dome formations, salt bed formations, underground mines and caves.* The placement of any noncontainerized or bulk liquid hazardous waste in any salt dome formation, salt bed formation, underground mine or cave is prohibited, except for the Department of Energy Waste Isolation Pilot Project in New Mexico.

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40 C.F.R. § 264.258 Closure and post-closure care.

(a) At closure, the owner or operator must remove or decontaminate all waste residues, contaminated containment system components (liners, etc.), contaminated subsoils, and structures and equipment contaminated with waste and leachate, and manage them as hazardous waste unless § 261.3(d) of this chapter applies.

(b) If, after removing or decontaminating all residues and making all reasonable efforts to effect removal or decontamination of contaminated components, subsoils, structures, and equipment as required in paragraph (a) of this section, the owner or operator finds that not all contaminated subsoils can be practicably removed or decontaminated, he must close the facility and perform post-closure care in accordance with the closure and post-closure care requirements that apply to landfills (§ 264.310).

(c)(1) The owner or operator of a waste pile that does not comply with the liner requirements of § 264.251(a)(1) and is not exempt from them in accordance with § 264.250(c) or § 264.251(b) must:

(i) Include in the closure plan for the pile under § 264.112 both a plan for complying with paragraph (a) of this section and a contingent plan for complying with paragraph (b) of this section in case not all contaminated subsoils can be practicably removed at closure; and

(ii) Prepare a contingent post-closure plan under § 264.118 for complying with paragraph (b) of this section in case not all contaminated subsoils can be practicably removed at closure.

(2) The cost estimates calculated under §§ 264.142 and 264.144 for closure and post-closure care of a pile subject to this paragraph must include the cost of complying with the contingent closure plan and the contingent post-closure plan, but are not required to include the cost of expected closure under paragraph (a) of this section.

Conn. Gen. Stat. § 8-1. Zoning commissions. (a) Any municipality may, by vote of its legislative body, adopt the provisions of this chapter and exercise through a zoning commission the powers granted hereunder. On and after July 1, 1974, in each municipality, except as otherwise provided by special act or chapter provision adopted under chapter 99, the zoning commission shall consist of not less than five nor more than nine members, with minority representation as determined under section 9-167a, who shall be electors of such municipality. The number of such members and the method of selection and removal for cause and terms of office shall be determined by ordinance, provided no such ordinance shall designate the legislative body of such municipality to act as such zoning commission, except that (1) in towns having a population of less than five thousand, the selectmen may be empowered by such ordinance to act as such zoning commission, (2) a legislative body which is acting as a zoning commission prior to July 1, 1974, pursuant to an ordinance, may continue to act as such zoning commission if such municipality has initiated a charter revision pursuant to section 7-188, prior to July 1, 1974, which revision proposes to designate such legislative body as the zoning commission, and such charter revision is approved as provided in section 7-191, and (3) a legislative body which is acting as a zoning commission prior to June 17, 1987, pursuant to a special act may continue to act as such zoning commission. The manner for filing vacancies arising from any cause shall be provided by vote of the legislative body.

(b) The zoning commission of any town shall have jurisdiction over that part of the town outside of any city

or borough contained therein except that the legislative body of any city or borough may, by ordinance, designate the zoning commission of the town in which such city or borough is situated as the zoning commission of such city or borough.

Conn. Gen. Stat. § 8-2. Regulations. The zoning commission of each city, town or borough is authorized to regulate, within the limits of such municipality, the height, number of stories and size of buildings and other structures; the percentage of the area of the lot that may be occupied; the size of yards, courts and other open spaces; the density of population and the location of use of buildings, structures and land for trade, industry, residence or other purposes, including water-dependent uses as defined in section 22a-93, and the height, size and location of advertising signs and billboards. Such zoning commission may divide the municipality into districts of such number, shape and area as may be best suited to carry out the purposes of this chapter; and, within such districts, it may regulate the erection, construction, reconstruction, alteration or use of buildings or structures and the use of land. All such regulations shall be uniform for each class of kind of buildings, structures or use of land throughout each district, but the regulations in one district may differ from those in another district, and may provide that certain classes or kinds of buildings, structures or uses of land are permitted only after obtaining a special permit or special exception from a zoning commission, planning commission, combined planning and

zoning commission or zoning board of appeals, whichever commission or board the regulations may, notwithstanding any special act to the contrary, designate, subject to standards set forth in the regulations and to conditions necessary to protect the public health, safety, convenience and property values. Such regulations shall be made in accordance with a comprehensive plan and shall be designed to lessen congestion in the streets; to secure safety from fire, panic, flood and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to a avoid undue concentration of population and to facilitate the adequate provision for transportation, water, sewerage, schools, parks and other public requirements. Such regulations shall be made with reasonable consideration as to the character of the district and its peculiar suitability for particular uses and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such municipality. Such regulations shall also encourage the development of housing opportunities for all citizens of the municipality consistent with soil types, terrain and infrastructure capacity. Zoning regulations shall be made with reasonable consideration for their impact on agriculture. Zoning regulations may be made with reasonable consideration for the protection of historic factors and shall be made with reasonable consideration for the protection of existing and potential public surface and ground drinking water supplies. On and after July 1, 1985, the regulations shall provide that proper provision be made for soil erosion and sediment control pursuant to section 22a-329.

Such regulations may also encourage energy-efficient patterns of development, the use of solar and other renewable forms of energy, and energy conservation. The regulations may also provide for incentives for developers who use passive solar energy techniques, as defined in subsection (b) of section 8-25, in planning a residential subdivision development. The incentives may include, but not be limited to, cluster development, higher density development and performance standards for roads, sidewalks and underground facilities in the subdivision. Such regulations may provide for a municipal system for the creation of development rights and the permanent transfer of such development rights, which may include a system for the variance of density limits in connection with any such transfer. Such regulations may also provide for notice requirements in addition to those required by this chapter. No such regulations shall prohibit the operation of any family day care home or group day care home in a residential zone. Such regulations shall not impose conditions and requirements on manufactured homes having as their narrowest dimension twenty-two feet or more and built in accordance with federal manufactured home construction and safety standards or on lots containing such manufactured homes which are substantially different from conditions and requirements imposed on single-family dwellings and lots containing single-family dwellings. Such regulations shall not impose conditions and requirements on developments to by occupied by manufactured homes having as their narrowest dimension twenty-two feet or more and built in accordance with federal manufactured home construction and safety standards which are substantially

different from conditions and requirements imposed on multifamily dwellings, lots containing multifamily dwellings, cluster developments or planned unit developments. Such regulations shall not prohibit the continuance of any nonconforming use, building or structure existing at the time of the adoption of such regulations. Such regulations shall not provide for the termination of any nonconforming use solely as a result of nonuse for a specified period of time without regard to the intent of the property owner to maintain that use. Any city, town or borough which adopts the provisions of this chapter may, by vote of its legislative body, exempt municipal property from the regulations prescribed by the zoning commission of such city, town or borough; but unless it is so voted municipal property shall be subject to such regulations.

Conn. Gen. Stat. § 22a-114. Legislative finding; policy of the state. The general assembly finds that improper management of hazardous wastes has contaminated the water, soil and air of the state thereby threatening the health and safety of Connecticut citizens; that the economic benefits to the state from industry are jeopardized if hazardous waste disposal facilities are not available in Connecticut; that the safe management of hazardous wastes, including state involvement, is mandated by the Federal Resource Conservation and Recovery Act of 1976 (42 USC 6901 et seq.) and implementing regulations; that the siting of hazardous waste disposal facilities is in the best interest of Connecticut's citizens and that the public

should participate in siting decisions. Therefore the general assembly declares that it is the policy of the state to initiate final remedial action by the year 2000 at each hazardous waste disposal site listed on July 3, 1989, on the inventory maintained by the commissioner of environmental protection pursuant to section 22a-133c and to assure the siting of hazardous waste disposal facilities so that the health and safety of Connecticut's citizens and the environmental and economic interests of the state are protected. The purpose of this chapter is to establish a process for the siting of hazardous waste facilities that will protect the health and safety of Connecticut citizens and assure responsible economic development and to have that siting process be at least as strict as that required by federal law.

Conn. Gen. Stat. § 22a-117. Construction or modification of hazardous waste facility. When certificate required. Transfer of certificate. Polychlorinated biphenyls. (a) No person shall commence construction or modification of a hazardous waste facility unless such person has been issued a certificate of public safety and necessity by the council, except as provided in subsection (b) of this section. The permanent members of the council shall determine if any change in the approved design, capacity, process or operation of a hazardous waste facility is a modification as defined by section 22a-115. Any facility for which such a certificate is required shall thereafter be built, maintained and operated in conformity with such

certificate, including all terms, limitations or conditions contained therein.

(b) Sections 22a-114 to 22a-130, inclusive, shall apply to the construction of any hazardous waste facility except existing facilities and to the construction or modification of any hazardous waste facility except: (1) Any facility whose primary business is not disposal, treatment or recovery of hazardous waste but which treats or recovers hazardous waste on site as an integral part of an industrial process as determined by the commissioner; (2) any facility approved by the commissioner designed and operated by or for municipalities pursuant to their obligations under section 22a-220 to provide for solid waste disposal, and (3) any facility used only for the short-term storage of hazardous waste.

(c) No certificate may be transferred without the approval of the permanent members of the council. Any transferee shall comply with the terms, limitations and conditions contained in the certificate. The permanent members of the siting council shall not approve any such transfer if they find that such transfer was contemplated at or prior to the time the certificate was issued and such fact was not adequately disclosed during the certification proceeding, or if they find that the transferee lacks the financial, technical or management capabilities to comply fully with the terms, limitations or conditions of the certificate.

(d) A certificate may be amended as provided in this chapter.

(e) Any application for a permit to store or dispose of polychlorinated biphenyls, for a fee or other consideration, pursuant to sections 22a-454 and 22a-467, pending as of May 28, 1981, or filed prior to July 1, 1981, shall not be acted on by the commissioner but shall be transferred on July 1, 1981, to the council.

(f) The storage or disposal for a fee or other consideration, in excess of the amount stored or disposed of in the normal operation of any facility as of May 28, 1981, is prohibited until regulations concerning the storage or disposal of polychlorinated biphenyls are adopted by the commissioner and such regulations are exempted from preemption by the United States Environmental Protection Agency pursuant to the Federal Toxic Substance Control Act of 1976, (15 USC 2601 et seq.). This subsection prohibits the otherwise regulates the manner and method of disposal of polychlorinated biphenyls within the meaning of said federal act. Upon adoption of such regulations and exemption from preemption by the United States Environmental Protection Agency, the storage or disposal of polychlorinated biphenyls for a free or other consideration shall not be allowed except in accordance with a certificate of public safety and necessity issued under the provisions of this chapter.

Conn. Gen. Stat. § 22a-122. Decision and opinion. Criteria for decision. Findings and determination. Financial responsibility. Service and publication. Appeal.

* * *

(b) In making its decision, the council shall consider: (1) The impact of the proposed facility on the municipality and affected geographic area in which it is to be located in terms of public health, safety and welfare including but not limited to (A) the risk and impact of accident during transportation of hazardous waste, (B) the risk and impact of fires or explosions from improper storage or disposal methods, (C) consistency of the proposed facility with local and regional land use plans and regulations and the state conservation and development plan in effect at the time the applicant applies to the commissioner of environmental protection for the environmental licenses, permits, or approvals necessary to construct and operate the facility, and with existing and proposed development in the area, (D) the protection of the public from adverse impacts including but not limited to adverse economic impacts of the facility during its construction and operation and after its operation life, (E) the risk and impact on public and private drinking water supplies; (2) the population density in the areas of proposed facility and its proximity to residential areas; (3) data available under the Superfund Amendments and Reauthorization Act of 1986 concerning permitted and illegal discharges in the geographical area affected by the proposed facility; (4) the proximity of the proposed facility to schools; (5) the availability of other sites and (6) other criteria consistent with the goal of insuring the maximum safety of the public from potential dangers

associated with the siting and the development and management of construction of hazardous waste facilities which may be established by regulation adopted by the permanent members of the council in accordance with the provisions of subsection (c) of section 22a-116. The permanent members of the council shall adopt regulations in accordance with the provisions of said chapter establishing minimum distances between the active parts of the facility and other land uses.

Conn. Gen. Stat. § 22a-124. Exclusive jurisdiction of board. Municipal regulation of proposed location. Appeal of zoning decision. (a) Notwithstanding any other provision of the general statutes, the council shall have exclusive jurisdiction over the siting of facilities subject to the provisions of this chapter. In ruling on applications for certificates for facilities, the council shall give such consideration to other state laws and municipal ordinances and regulations as it shall deem appropriate. Whenever the council issues a certificate of public safety and necessity pursuant to this chapter, such certificate shall satisfy and be in lieu of all other certificates, licenses, permits or approvals, or other requirements of state or municipal agencies in regard to any question of public safety and necessity.

(b) A proposed hazardous waste facility may be regulated and restricted by any town, city or borough pursuant to chapters 124 and 126 and by any municipality pursuant to sections 22a-42 and 22a-42a. The applicant shall apply for any permits required by such

agencies at the same time as the filing of the application with the council. Such local bodies may make all decisions necessary to the exercise of such power to regulate and restrict, which decisions shall be made within one hundred thirty days of any application notwithstanding any other statute to the contrary and shall be in writing and recorded in the records of their respective communities, and written notice of any decision shall be given to each party affected thereby. Each such decisions shall be subject to the right of appeal within thirty days after the giving of such notice by any party aggrieved to the council, which shall have exclusive jurisdiction, in the course of any proceeding on an application for a certificate or otherwise, to affirm, modify or revoke such order to make any decision in substitution thereof by a vote of eight of the members of the council. Appeal of a local zoning decision to the council shall be in lieu of any other appeal authorized by the general statutes.

APPENDIX B

NO. 30 57 76	)	SUPERIOR COURT
THE UPJOHN COMPANY	)	JUDICIAL DISTRICT OF NEW HAVEN
V.	)	
THE PLANNING & ZONING COMMISSION OF THE TOWN OF NORTH HAVEN	)	MARCH 25, 1991

MEMORANDUM OF DECISION

The plaintiff, The Upjohn Company ("Upjohn") appeals from the decision of the defendant, the Planning and Zoning Commission of the Town of North Haven ("Commission") denying its applications for approval of a site improvement plan and of a coastal site plan and for issuance of an excavation permit and a fill permit. All of the approvals sought by Upjohn related to its implementation of a plan to install a permanent cap on an existing pile of chemical sludge on its property at 410 Sackett Point Road in North Haven and to "close" the sludge pile in a manner which would leave the pile permanently on the site.

The court finds that Upjohn, as the owner of the property and applicant for the approvals and permits, has established aggrievement.

Upjohn filed its applications on August 8, 1990, and the Commission held a public hearing to consider them on September 10, 1990. The Commission voted to deny each of the applications stating as its reason that the existence of the sludge pile to which the applications

related constituted an ongoing zoning violation on the premises. Notice of the Commission's decision was published in the New Haven Register on September 19, 1990, and this appeal from the denial of its applications was timely filed by Upjohn.

Upjohn claims that the Commission acted arbitrarily, capriciously and in excess of its statutory powers in the following respects:

1. The outside disposal of solid sludge waste is an accessory use incidental to its chemical manufacturing business and is a permitted use in the Industrial District IG-80 zone in which the property is located and therefore did not constitute a zoning violation as claimed by the Commission.

2. The closure for the hazardous waste at issue was approved by state and federal environmental regulatory agencies and such approval preempts enforcement of North Haven's zoning regulations.

3. The applications met all the legal requirements and the Commission acted in excess of its statutory authority in denying them on the basis of a finding of an existing zoning violation on the premises.

4. The Commission failed to consider the beneficial effects of the closure plan as required by §§22a-92 and -106 C.G.S.

5. The finding that the sludge pile constituted a zoning violation was not supported by reliable, probative and substantial evidence in the record and Upjohn was not advised that the Commission would consider this and was thereby deprived of an opportunity to present evidence to rebut this finding.

I NOTICE

The public hearing on Upjohn's applications opened with an explanation by Upjohn of its reasons for seeking permits for interim closure of the sludge pile that had in fact already been accomplished (Doc. 21, p. 16-17) and for further work to achieve final closure of the pile. Early in the hearing, the Town Counsel, Robert Ciulla, reminded the Commission of the history of the sludge pile, noting that in 1983 the Commission had determined that the pile constituted a zoning violation and should be removed from the site (Doc. 21, pp. 18-20). Attorney Ciulla stated that Upjohn was taking the position that the sludge pile was an accessory use to its chemical manufacturing facility and that the Commission had in past litigation taken the position that the maintenance of a sludge pile covering four acres of the site was not an accessory use but constituted a use not authorized by the zoning regulations (Doc. 21, pp. 26-27). Attorney Ciulla told the Commission that granting the permits to close the pile would be a reversal of the positions taken by the Commission in three pending administrative appeals and in an injunction action that had been instituted by the Town and pursued to conclusion in United States District Court.

This preamble, along with its own familiarity with the position taken by the Commission since 1983, put Upjohn on notice that in reviewing its application the Commission would consider the maintenance of the sludge pile to be a violation. Upjohn was provided with a further opportunity to be heard (Doc. 21, p. 56) and introduced no evidence to contradict Attorney Ciulla's admonition that the maintenance of the pile could be

considered a zoning violation. Rather, Upjohn's spokesperson, Attorney Parese, invited the Commission to "decide the application before you this evening on the basis of the regulations of this Commission . . . " (Doc. 21, p. 57).

Upjohn has cited no authority in support of its contention that a zoning authority must identify in advance the ground upon which it ultimately denies an application. Even if such a proposition were accepted, the record indicates that Upjohn was well aware, both because of Attorney Ciulla's remarks and because of the Commission's position in *Upjohn v. North Haven Planning and Zoning Commission*, Docket No. 250632 (Superior Court for New Haven Judicial District at New Haven), which was pending at the time of the applications at issue here, that the Commission considered the sludge pile a use not authorized by the zoning regulations. Upjohn had ample opportunity to present any evidence to establish that the use was in fact a permitted accessory use but did not do so.

There is no merit to Upjohn's claim that it was denied an opportunity to address the consideration on which the Commissioner based its denial of the applications.

II THE COMMISSION'S DETERMINATION

A planning and zoning commission acts in an administrative capacity when, upon considering a permit application, it determines whether the applicant's proposed use is one which satisfies the standards set forth in the zoning regulation. *Norwich v. Norwalk Silbert Vault Co.*, 208 Conn. 12 (1988); *Conto v. Zoning Commission*, 186

Conn. 106, 111 (1982); *Goldberg v. Zoning Commission*, 173 Conn. 23, 25 (1977).

Where a zoning authority has stated its reasons for denial of an application for site plan approval, the reviewing court must determine whether the assigned grounds are reasonably supported by the record and whether they are pertinent to the considerations which the authority was required to apply under the zoning regulations. *Goldberg v. Zoning Commission, supra*, at 25-26; *DeMaria v. Planning and Zoning Commission*, 159 Conn. 534, 540 (1970).

A zoning commission may resort to and rely on a town zoning map, *Burnham v. Planning and Zoning Commission*, 189 Conn. 261, 267 (1983), and the record supports the Commission's determination that a waste pile of four acres (denominated a "landfill" in Upjohn's application, Doc. 26, DD 1826-A) was not a permitted use in the zone in which the Upjohn property is located.

Pursuant to Section 6 of the North Haven zoning regulations, the Commission determined that Upjohn's site was, at the time of the applications, in an industrial district. The permitted uses for such a district are restricted to those indicated by check marks in a table of permitted uses for the various zones. Pursuant to Section 6 "[n]o use shall be permitted in any Commercial or Industrial District except one which is indicated by a check mark . . . applicable to the district in which such use is located." The permitted uses set forth in §§6.1.1-6.1.74, for the district in which Upjohn's property is located do not include a landfill or storage of sludge or chemical waste.

The evidence on the record supports the determination that the maintenance of a four-acre sludge pile does not constitute an accessory use pursuant to §6.1.71 of the regulations, which permits "accessory uses customarily incidental to a permitted use on the same premises." If the permanent storage of waste produced by a permitted use were construed to be an accessory use, each and every household and business that produced trash or debris would be entitled to maintain a permanent landfill on its premises. Since several of the explicitly permitted uses enumerated in Section 6 of the zoning regulations concern storage of various substances, long term storage of waste in bulk cannot logically be viewed as a generally authorized accessory use. (See §§6.1.55, 6.1.65, 6.1.66, 6.1.67, 6.1.72).

The Commission acted within its discretion in determining that establishment of a four-acre landfill for chemical waste was not an accessory use within the standard of *Lawrence v. Zoning Board of Appeals*, 158 Conn. 509, 512-13 (1969). Upjohn has not demonstrated that the conclusion of the zoning authority that the sludge pile was not a permitted use or an accessory use is not reasonably supported by the record or that the Commission acted illegally, arbitrarily or in abuse of its discretion in so finding. *Beit Havurah v. Zoning Board of Appeals*, 177 Conn. 440 (1979).

Upjohn claims that the Commission exceeded its powers by failing to grant its applications on the basis of their facial compliance with Section 8 of the zoning regulations and by denying them for reasons related to the use of the improvements rather than restricting its inquiry to the technical correctness of the plans.

Section 8.3 of the zoning regulations provides that

> The Commission in considering and reviewing the application and in arriving at its decision shall be guided by and take into consideration the public health, safety, general welfare and general effect of the same on the neighborhood, the duration of operations, future usefulness of the premises, the impact of vehicular traffic in the area, and such other factors as may bear upon or relate to the coordinate adjusted and harmonious physical development of the Town of North Haven.

Where excavation permits and other approvals are sought in order to establish or continue a use that is not permitted under the zoning regulations, the commission is plainly warranted to deny them pursuant to the standard set forth in §8.3 of the regulations, since enforcement of the limitations upon uses of land for various zones is indisputably a method of addressing the considerations set forth above.

The situation at issue here is entirely distinguishable from the denials which this court disapproved in *Upjohn Company v. North Haven Planning and Zoning Commission*, Docket No. 280709 (Superior Court for the New Haven Judicial District at New Haven, February 22, 1991). In that prior appeal, the Commission cited the existence of the sludge pile as a zoning violation as a reason for denying permission for site improvements unrelated to the sludge pile. Here, all of the applications were in aid of Upjohn's purpose of making the sludge pile a permanent use on the property, and the Commission was within its discretion in denying permission for activities directly related to maintaining an illegal use of the property.

EPA/DEP APPROVAL OF CLOSURE

Upjohn contends that because state and federal environmental authorities approved its plan to cope with the sludge pile by closing it on site, the Commission is precluded from refusing to grant permits to effectuate such closure.

Upjohn's claim of preemption is not supported by any showing that the federal and state environmental authorities have ever ruled that capping the pile is the only environmentally sound means of addressing it and there is therefore no basis for a finding that enforcement of zoning regulations is in direct conflict with an enforcement action of these agencies. In *North Haven Planning and Zoning Commission v. Upjohn Company*, 921 F.2d 32, 28 (2d Cir. 1990), the U.S. Court of Appeals for the Second Circuit upheld a federal trial court determination that the federal Resource Conservation Recovery Act (RCRA) did not preempt local zoning regulations with regard to the sludge pile and noted that "EPA and DEP responded to public comments and questions by stating that if the Connecticut courts upheld a ruling that Upjohn's current plan [closure] would violate zoning regulations, Upjohn would have to submit to EPA and DEP a new plan for review and approval." *Id.*

Upjohn's reliance on *Ensco Inc. v. Dumas*, 807 F.2d 743 (8th Cir. 1986) is misplaced. In that case, the municipality enacted an ordinance after and in conflict with an EPA plan for the incineration of certain waste at the kind of facility already existing in the municipality. In *Ogden Environmental Services v. City of San Diego*, 687 F. Supp.

1436, 1445 (S.D.Cal. 1988), on which Upjohn relies, the court noted that RCRA did not preempt the municipal requirement for conditional use permits *per se* but found that a city's use of review of such permits to come to a conclusion contrary to an EPA determination as to general health and safety issues is impermissible. This holding does not recognize preemption where, instead, a zoning authority is exercising an independent duty to regulate the location within a town of the various permitted uses.

Contrary to Upjohn's argument, the fact that North Haven permits some waste storage upon prior application and approval pursuant to §3.27.2.24 of its zoning regulations does not entitle Upjohn to approval of its decision to create and to make permanent a pile of waste for which approval was neither sought nor granted.

On the record presented, the court finds no reason not to adopt the view of the Second Circuit that the application of the North Haven zoning regulations is not preempted by RCRA or by state law in the situation presented.

THE COASTAL AREA MANAGEMENT APPLICATION

The Coastal Management Act, §§22a-90 C.G.S. *et seq.*, establishes a procedure by which a local zoning commission reviews a proposed project to determine its conformity both with municipal zoning regulations and with the provisions of the Act. Upjohn contends that the Commission erred in failing to find that its application complied with the Act. Section 22a-110 C.G.S. provides in relevant part that

> A coastal site plan required under this section may be modified or denied if it fails to comply with the requirements already set forth in the zoning regulations of the municipality. . . .

Having determined that the plan submitted related to a use of land that violated zoning regulations, the Commission had no cause to go on to determine whether the proposal complied with the Act. Its procedure was proper and its determination is supported by the evidence in the record.

CONCLUSION

None of the grounds asserted by the appellant have been established, and its appeal from the Commission's denial of its four applications is therefore dismissed.

/s/ Hodgson J
Beverly J. Hodgson
Judge of the Superior Court